UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ELWANDA D. FOX,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-264-P-C***
	)	
LIFE INSURANCE COMPANY OF NORTH AMERICA,	***)***	
	)	
	)	
Defendant	***)***	

ORDER ON DISCOVERY DISPUTE

As noted in my Report of Hearing and Order re: Discovery Dispute dated April 14, 2000 in this matter, the defendant has objected to the plaintiff's notice of deposition of the defendant pursuant to Fed. R. Civ. P. 30(b)(6) in this action alleging wrongful denial of benefits under a plan covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* The parties have now submitted letter-form briefs and additional documents in accordance with the terms of my April 14, 2000 order.

The defendant takes the position that the applicable standard of review for the plaintiff's claims is the deferential "arbitrary and capricious" standard limited to the administrative record before the defendant when its decision was made. The plaintiff responds that a *de novo* standard of review is applicable in this case and that she is therefore entitled to take the deposition.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court held that a denial of benefits challenged under ERISA "is to be reviewed under a *de novo* standard unless the

benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id*. at 115. In this case, the defendant contends that the following policy language provides such discretionary authority:

> The Plan Administrator has authority to control and manage the operation of the plan.
>
> The Insurance Company will begin paying Monthly Benefits in amounts determined from the Schedule when it receives due proof that: (1) the employee became disabled while insured for this Long Term Disability Insurance; and (2) his Disability has continued to a period longer than the Benefit Waiting Period shown in the Schedule.

Summary Plan Description, Long Term Disability Income Plan, Clark Equipment Company, copy attached to letter brief of defendant dated April 27, 2000, at 22; Group Long Term Disability Income Policy, Group Policy No. LK-10025, copy attached to defendant's letter brief, at 8.

In *Terry v. Bayer Corp*., 145 F.3d 28, 37 (1st Cir. 1998), the First Circuit cited *Cooke v. Lynn Sand & Stone Co*., 70 F.3d 201, 204 (1st Cir. 1995), in support of its conclusion that plan language stating that the administrator had "exclusive control and authority over administration of the Plan" was "insufficient to satisfy *Firestone*" and thus did not require deferential review. This language does not differ significantly from the first sentence taken from the instant plan upon which the defendant relies. *See also McLauglin v. Reynolds*, 886 F. Supp. 902, 905 (D. Me. 1995), in which this court held that the following plan language did not grant sufficient discretionary authority to allow the court to engage in deferential review under ERISA: "The vice president, employee relations, . . . is responsible for interpretations of this plan." Accordingly, the first sentence from the plan at issue on which the defendant relies does not prevent *de novo* review by this court. *See McCoy v. Federal Ins. Co.*, 7 F.Supp.2d 1134, 1140 (E.D.Wash. 1998).

The second sentence upon which the defendant relies offers less evidence of discretionary authority than does the first. The "due proof" requirement does not support a limitation to the deferential scope of court review. *Ellis v. Egghead Software Short-Term & Long-Term Disability Plans*, 64 F.Supp.2d 980, 983-84 (E.D.Wash. 1999).

Accordingly, *de novo* review appears at this time to be indicated in this case. While the question whether such review may be limited to the record considered by the plan administrator or fiduciary remains open in this circuit, *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 833 (1st Cir. 1997), the scope of the proposed Rule 30(b)(6) deposition does not appear unduly broad and, at this point in the proceeding, such discovery is appropriate.

For the foregoing reasons, I conclude that the plaintiff may proceed with the proposed deposition of the defendant. In accordance with my April 14th Order, the discovery deadline is enlarged to June 1, 2000 and the motion deadline to June 8, 2000.

SO ORDERED.

Dated this 2nd day of May, 2000.

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David M. Cohen
United States Magistrate Judge

FOX v. LIFE INSURANCE CO OF, et al Filed: 08/31/99 Assigned to: JUDGE GENE CARTER Jury demand: PlaintiffDemand: $0,000 Nature of Suit: 791Lead Docket: None Jurisdiction: Federal QuestionDkt# in other court: None Cause: 29:1002 E.R.I.S.A.: Employee RetirementELWANDA D FOX PAUL F. MACRI plaintiff 784-3576 [COR] JOHN E. SEDGEWICK 784-3576 [COR LD NTC] BERMAN & SIMMONS, P.A. P. O. BOX 961 LEWISTON, ME 04243-0961 784-3576 v.CLARK EQUIPMENT CO GERALDINE G. SANCHEZ, ESQ.dba [term 04/14/00] CLARK-HURTH COMPONENTS [COR LD NTC] defendant PIERCE, ATWOOD [term 04/14/00] ONE MONUMENT SQUARE PORTLAND, ME 04101-1110 791-1100LIFE INSURANCE COMPANY

OF ALISON DENHAM, ESQ.NORTH AMERICA [COR LD NTC]dba DOUGLAS, DENHAM, ROGERS & HOODCIGNA GROUP INS 103 EXCHANGE STREET defendant P.O. BOX 7108 PORTLAND, ME 04112-7108 207-774-1486